Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KURT E. JOHNSON,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Third District

PETITION FOR WRIT OF CERTIORARI

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HOPP

QUESTIONS PRESENTED

1. Whether the Fifth, Sixth and Fourteenth Amendments forbid guilty verdict affirmation, where the petitioner was precluded from participating in off-site pre-challenge communications between the trial court and three verdict-rendering jurors?

a) Whether a silent record can support an implied waiver of the defendant's right to be present during all stages of jury selection?

2. Whether petitioner was deprived of effective assistance of trial counsel, where trial counsel invited pre-jury qualification communications to be heard in petitioner's absence, without securing any "record" admonitions or waiver of petitioner's right to be present during all stages of jury selection?

a) Whether petitioner was deprived effective assistance of counsel on direct appeal, where appellate counsel failed to obtain or utilize the jury selection transcript and any jury selection issues on direct appeal, *albeit* the available trial transcript disclosed partial jury voir dire in petitioner's absence and significant *Batson/Powers/J.E.B.* issues?

PARTIES TO THE PROCEEDING

Kurt Johnson is the petitioner. He appears herein through retained counsel, Allan A. Ackerman, 2000 North Clifton Avenue, Chicago, Illinois, 60614, (312) 332-2891.

Respondent is the State of Illinois through Attorney General James Ryan, 100 East Randolph Street, 12th Floor, Chicago, Illinois, 60601, (312) 814-3000.

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PETITION FOR WRIT OF CERTIORARI

Kurt E. Johnson, petitioner, by his attorney, Allan A. Ackerman, requests that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court, Third District, entered on April 24, 1998 in *Illinois v. Kurt E. Johnson*.

OPINION BELOW

The unpublished opinion of the Illinois Appellate Court, Third District, is unreported and is reproduced at App. 1-6, *infra*. Petitioner's request for Illinois Supreme Court review was denied on October 6, 1998, App. 7, *infra*.

JURISDICTION

The Appellate Court of Illinois, Third District, affirmed the judgment of the Circuit Court of Will County, Illinois denying petitioner's request for post-conviction relief. The Illinois Supreme Court declined review on October 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment to the U.S. Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the U.S. Constitution, in part, states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner was convicted in the Circuit Court of Will County, Illinois of first-degree murder and was sentenced to thirty-eight years imprisonment.

On November 17, 1993, petitioner was indicted by a Will County, Illinois grand jury for first-degree murder. Petitioner was detained pending trial and was represented by private counsel. His jury trial commenced in

Will County, Illinois on April 24, 1995. Prior to jury selection, colloquy between the trial court and counsel, disclosed the following:

> MR. BURMILA [Defense Counsel]: Thank you, Judge. Then I think we are ready to proceed.
>
> THE COURT: Okay. Now, as to the questioning, looking at something, if they were to have heard or read something about this, whether or not that would jog their memory with regards to that—
>
> MR. BURMILA: Judge, I trust the court's inquiry. If anybody says anything that I think may lead to some information, of course, that would taint the rest of the jurors.
>
> The court's *habit* has always been in the past to interview that person individually, and I certainly think Mr. McCabe and I and Ms. Devriendt would go out in the hallway and question the jury that way.

Orig. Trial Tr. at 10-11 (ital. emph. added; Mr. McCabe and Ms. Devriendt were the Will County prosecutors).[1]

The trial facts disclosed that during the early morning hours of October 25, 1993, petitioner telephoned his erstwhile girlfriend, Kimberly Markel, from a saloon in the Joliet, Illinois area. She invited him to her home so they could discuss their differences. As petitioner drove up to her home, her [then] current boyfriend, Michael

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[1] The record is barren of any intimation that the above colloquy took place in Johnson's presence. In his post-conviction affidavit he asserted that he was totally unaware of his right to be present during all jury questioning and had he been aware of his right to be present it would have been exercised (App. 13-14, *infra*).

Beshoar, wielding an axe handle, attempted to enter petitioner's car from the passenger door. Beshoar was unable to get into the car, but used the axe handle to break the passenger window of petitioner's car. Petitioner drove approximately one-quarter of a block to a corner, turned around, returned to the area and exited his car with a loaded weapon. An ensuing altercation ended with petitioner shooting and killing Beshoar. Petitioner was arrested approximately forty-minutes later. Petitioner asserted self-defense as his trial theory and testified on his own behalf. On May 2, 1995, the jury returned a first-degree murder guilty verdict. On June 20, 1995, at age 33, petitioner was sentenced to thirty-eight years in custody (R. 880).

On July 15, 1996, his conviction and sentence was affirmed on direct appeal, *People v. Kurt E. Johnson*, Illinois Appellate Court, Third District, under No. 3-95-0459 (unpublished opinion). His request for Illinois Supreme Court review was denied on October 2, 1996 (168 Ill.2d 611, 671 N.E.2d 738; unpublished).

2. On March 12, 1997, petitioner sought relief pursuant to the Illinois Post-Conviction Act, 725 ILCS 5/122-1, *et seq.* (West 1994). Within the fabric of his post-conviction submissions he advanced Fifth, Sixth and Fourteenth federal constitutional deprivations by virtue of having been excluded from critical segments of jury selection, absent judicial admonitions and any voluntary and knowing waiver of his right to be present at all critical stages of his felony criminal trial (P.C. Rec. at 204-253). Petitioner's post-conviction filing also contended that his trial counsel (unbeknown to him) had, *sub silentio*, waived his right to be present during critical conversations with prospective jurors, while his

counsel on direct appeal had *failed* to order the transcription of the jury selection (which noted his absence during substantial segments of the jury selection process and *Batson*-jury challenges).

During jury selection the trial court periodically met with various jurors in the presence of counsel, but in petitioner's absence. One of the verdict-rendering jurors, Doris Norberg, related that one of her relatives was tried in federal court and was acquitted although others in the case went to prison (Supp. Tr. of 4/24/95 at 40-42). Verdict-rendering juror, Barbara Henegar, had a cousin involved with the mafia who was jailed in Cook County, Illinois some years earlier. *Id.* at 42-43. Another verdict-rendering juror, Tonia Metoyer, related that her spouse had been arrested because of his involvement with alcohol and underage individuals at a party years earlier. *Id.* at 85-86.[2] Jury selection was completed on April 25 and the trial proceeded to verdict. Petitioner was convicted on the single count of first-degree murder, with jurors Norberg, Henegar and Metoyer confirming the guilty verdict (R. 739-40).

The State's filing in opposition of post-conviction relief failed to challenge petitioner's post-conviction assertions regarding his right to be present, the lack of any judicial admonitions and the absence of any record-waiver [of his right to be present during all stages of jury selection] (P.C. Rec. at 253-261).

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[2] Petitioner, a pretrial detainee, remained in the courtroom under Will County Sheriff guard, while the juror interviews were conducted in a corridor outside of the courtroom. Pertinent segments of the jury-corridor colloquies are reproduced at App. 8-12, *infra*.

On July 15, 1997, the trial court summarily dismissed petitioner's post-conviction petition and petitioner prosecuted an appeal from the summary dismissal (P.C. Rec. at 262, 266). On April 24, 1998, the Illinois Appellate Court, Third District, filed its unpublished order affirming the summary dismissal of petitioner's post-conviction petition (App. 1-6, *infra*). On October 6, 1998, the Illinois Supreme Court declined petitioner's petition for leave to appeal (App. 7, *infra*).

REASONS FOR GRANTING THE PETITION

1. Certiorari should be granted because the circuits are divided on the questions of whether counsel may waive a defendant's constitutional right to be present during all stages of jury selection and, if so, what constitutes a valid waiver in connection with the defendant's right to fully participate in jury selection.

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee petitioner's right to be present at all stages of jury selection which is for constitutional purposes, a critical stage of the trial process. *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246 (1989) (Thus in affirming *voir dire* as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins.'" * * * Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial or political prejudice, * * * or predisposition about the defendant's culpabilities) (quotations and citations omit-

ted). In accord, *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965) (*voir dire* a necessary part of trial by jury—[and] "the right to exercise peremptory challenges is one of the most important rights secured to the accused,") (int. quotation marks and citations omitted). *Swain* notes that the denial or impairment of the right [to peremptory challenge] is reversible error without a showing of prejudice, 380 U.S. at 219, 85 S.Ct. at 835. The process of peremptory challenges is essential to an impartial trial, *Lewis v. United States*, 146 U.S. 370, 378, 13 S.Ct. 136, 139 (1882).[3]

At bar the record is pristine. In colloquy between the trial court and counsel, clearly in petitioner's absence, the attorneys discussed the trial court's "habit" of communicating with jurors in the courthouse corridor (Orig. Rec. at pp. 10-11). The record is devoid of any admonitions between the trial court and petitioner, or trial counsel and petitioner, *viz.*, his right to be present while prospective jurors were voicing their collective concerns regarding their ability to be fair jurors and petitioner's waiver of his right to be present during

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[3] See *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667 (1987) (". . . he has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" . . . "Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.") (internal authorities omitted).

those proceedings.[4] Certainly, there is no record support for a *Johnson v. Zerbst* waiver[5] and a "silent record" cannot support the waiver of constitutionally protected rights, *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712 (1969) (presuming waiver from a silent record is impermissible).

The circuits are divided on the question of whether counsel may waive a defendant's constitutional right to be present during all stages of jury selection and, if so, what constitutes a valid waiver in connection with the defendant's right to fully participate in jury selection. On the one hand, cases such as *Campbell v. Wood*, 18 F.3d 662, 670-73 (9th Cir. 1994), *cert. denied*, 105 S.Ct. 2169, hold that in a capital case, the accused may *personally* waive his fundamental right to be present at every stage of the trial, including voir dire and jury empanelment. In *Campbell*, a divided *en banc* court affirmed the denial of § 2254 relief, finding that *Camp-*

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[4] Ironically, in *Illinois v. Bennett*, 282 Ill.App.3d 975, 669 N.E.2d 717 (3rd Dist. 1996), the same appellate court from which certiorari is now sought reversed an attempt first-degree murder conviction while reviewing circumstances strikingly similar to the case at hand involving the same trial judge. In *Bennett*, defense counsel objected to the private interviews because the defendant was not allowed to be present, 669 N.E.2d at 719. The appellate panel, reviewing federal and Illinois precedent, found prejudicial error in *Bennett's* partial jury selection colloquy exclusion.

[5] 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023 (1938) (It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.) (int. quotation marks and n. 13 omitted).

bell's express written and open-court waiver(s) of his right to be present during jury voir dire and empanelment, constituted a complete waiver in accordance with *Johnson v. Zerbst*, 18 F.3d at 671-72.[6]

Decisions such as *United States v. Crutcher*, 405 F.2d 239, 242-44 (2nd Cir. 1968), *cert. denied*, 89 S.Ct. 1018 (1969), hold that defense counsel cannot waive the defendant's right to be present during jury voir dire and empanelment, absent the defendant's clear consent, 405 F.2d at 243-44 (defendant's silence will operate as a waiver of his right to be present at the impanelling of the jury *only if he was advised of that right*; Friendly, J., concurring). *Crutcher* was cited with approval in *United States v. Gordon*, 829 F.3d 119 (DC Cir. 1987). In *Gordon*, defense counsel requested that the trial court excuse the defendant from jury voir dire and empanelment because the defendant was in a holding cell, changing from prison garb to street clothing, and defense counsel—"as a tactical matter"—did not want the jurors to view the defendant in custody. The trial court agreed, without consulting the defendant. Post-conviction, *Gordon* sought conviction vacation based on his absence during voir dire and empanelment. The district court, finding "no prejudice" denied relief. A divided panel reversed finding the defendant's right to be present, as "rooted" in the Sixth Amendment, as well as the Due Process Clause, was thwarted in that ". . . *Gordon's* presence at jury selection had a "reasonably substan-

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[6] The affirming majority, while exploring waiver *vel non* invoked a *de novo* standard of review and reproduced the trial court's colloquy with *Mr. Campbell*, *viz.*, his right to be present during all jury selection proceedings; 18 F.3d at 672, 688-92.

tial" relation to his "opportunity to defend against the charge," 829 F.2d at 124 (supporting citations omitted). The *Gordon* majority cited *Crutcher* for the proposition that *Gordon's* waiver was a personal right that could be waived only by the accused after a personal "on-the-record" waiver. *Id.* at 124.

The Fourth Circuit, following the *Crutcher-Gordon* prejudice *per se* reasoning, seem to hold that the critical nature of the jury selection process is such that the government may (almost never) be able to demonstrate that the exclusionary error was harmless beyond a reasonable doubt. For example, in *United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992), the court, by way of *plain error*, held that the district court's empanelment of a jury in Mr. *Camacho's* absence was plain error *albeit Camacho's* counsel did not object to trial commencement in Mr. *Camacho's* absence.[7] However, in *United States v. Hanno*, 21 F.3d 42, 47 (4th Cir. 1994), the court reviewed the defendant's right, *vis-a-vis*, jury selection and reversed drug-related convictions because of jury selection improprieties. Mr. *Hanno* was present with counsel during jury selection on July

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[7] Mr. *Camacho* arrived several hours late because of a heavy snow storm. The trial court had waited some fifteen minutes and when Mr. *Camacho* had not arrived, jury voir dire and empanelment ensued, 955 F.2d at 52. The reversing panel, citing *United States v. Gordon* and *United States v. Crutcher*, *ante*, with approval, declined to decide that a defendant's complete absence from voir dire . . . "can never be treated as harmless error" . . . (We are in accord with the District of Columbia Circuit Court of Appeals' treatment of this issue: We need not, however, decide whether such error can ever be harmless; it is enough to find on the facts of this case that it was not . . . 955 F.2d at 955).

20, 1992. After the jury was empaneled, they were released because *Hanno's* trial was to commence on July 27, 1992. On that date, *Hanno* and his counsel learned that *Hanno's* jury had been dismembered and six of the Hanno jurors had been used in another case. The jury dismemberment was without notice to Hanno or his counsel. Absent objection, additional jurors were selected. *Hanno* was ultimately convicted of drug-related offenses. The Fourth Circuit, employing plain error review, reversed:

> The court in *Lewis* followed the case of *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), in which it held that the trial of the challenges to jurors for cause conducted out of the presence of the prisoner and his attorney was reversible error, even though not objected to. This decision, like the decision in *Lewis*, was based upon the constitutional requirement of the presence of the accused. *The Court found that a proceeding to ascertain the bias of jurors outside the presence of the accused was one "which involves his substantial rights." 110 U.S. at 578, 4 S.Ct. at 204. * * * Thus it has been authoritatively decided that jury selection is a critical stage of a criminal trial and that the presence of the accused is required. Hopt even held that the presence of the accused could not be waived by failure to object.*

21 F.3d at 47 (ital. emph. added).

In *United States v. Hernandez*, 873 F.2d 516 (2nd Cir. 1989), the court remanded *Hernandez'* drug conviction finding that the selection of the jury in the defendant's absence mandated a remand to determine whether the defendant was voluntarily absent during

jury voir dire and empanelment. The court cited *Crutcher* as follows:

> In *Crutcher*, this court indicated that the absence of a defendant during the empaneling of the jury—if not knowing and voluntary—may be an error that "can never be treated as harmless error." 405 F.2d at 244 (citation omitted). A number of courts, both within and without this Circuit have since wrestled with whether *Crutcher* should be read to mean that the absence of a defendant during voir dire of the jury is, if not knowing and voluntary, per se reversible error.

873 F.2d at 519.[8]

Post-*Hernandez*, the Second Circuit, has found an *implied* waiver in recent habeas cases. See *Cardinal v. Gorczyk*, 81 F.3d 18 (2nd Cir. 1996) (vacating § 2254 relief where the defendant fully participated in jury selection during his first trial, he could not assert partial jury selection exclusion where his attorney directed

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[8] The remainder of the quoted circuit-split paragraph reads:

> *See Gordon*, 829 F.2d at 127 (D.C. Cir.) (*Crutcher* read to mean that defendant's absence was *per se* a reversible error); *United States v. Alesandrello*, 637 F.2d 131, 139 & n. 12 (3d Cir. 1980) (distinguishing *Crutcher*), *cert. denied*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981); *United States v. Toliver*, 541 F.2d 958, 964 (2d Cir. 1978) (*Crutcher* might create *per se* rule); *United States v. Dioguardi*, 428 F.2d 1033, 1039 (2d Cir.) (not improper to hold part of voir dire outside defendants' hearing; defendants did not object), *cert. denied*, 400 U.S. 825, 91 S.Ct. 50, 27 L.Ed.2d 54 (1970); see also, 3 C.A. Wright, *Federal Practice and Procedure* § 721, at 7 n.9 (1982).

873 F.2d at 519.

him not to participate during the individual voir dire of prospective jurors; the court found an implied or inferred waiver) (distinguishing *United States v. Crutcher*; 81 F.3d at 20); in accord, *Tankleff v. Senkowski*, 135 F.3d 235, 246-47 (2nd Cir. 1998) (inferred waiver where it was reasonable to conclude that defendant knew of the *in camera* juror interviews and there was no indication that defendant or his lawyers were under the mistaken belief defendant could not attend the *in camera* interviews).

The Court's controlling precedent fails to answer whether, and under what circumstances, counsel may substitute his or her acquiescence in a defendant's absence from significant and important segments of the jury selection process. The Courts of Appeals are divided on whether on-the-record trial court admonitions are mandated, *viz.*, the defendant's right to be present during all jury voir dire interviews. This case provides an appropriate vehicle for resolving a question that continues to divide the circuits and State reviewing courts.[9]

* * * *

2. Whether petitioner was deprived of effective assistance of trial counsel, where trial counsel invited pre-jury qualification communications to be heard in petitioner's absence, without securing any "record" admonitions or waiver of petitioner's right to be present during all stages of jury selection?

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[9] For example, see *New York v. Davidson*, 89 N.Y.2d 881, 675 N.E.2d 1206, 1207 (N.Y. 1996) (*per se* prejudice from defendant's exclusion from bench conferences with prospective jurors regarding their ability to be fair and impartial).

a) Whether petitioner was deprived effective assistance of counsel on direct appeal, where appellate counsel failed to obtain or utilize the jury selection transcript and any jury selection issues on direct appeal, *albeit* the available trial transcript disclosed partial jury voir dire in petitioner's absence and significant *Batson/Powers/J.E.B.* issues?

Counsel on direct appeal *never ordered the jury voir dire transcript*. Yet, the original record obtained by [direct] appellate counsel included the following *Batson* colloquy:

> MR. BURMILA [Defense Counsel]: I just have a—I would like the record to reflect that the State used five of their six challenges to remove women from the panel.
>
> Two of the five women they removed were African American. There were three African American women in the panel.
>
> I think the State evidenced both gender and race discrimination.
>
> I have nothing else to say.
>
> MR. MCCABE [Prosecutor]: I don't believe there is a prima facie case of anything.
>
> If you not, I believe there is nine women on the jury and three men, and that is the result of the voir dire being predominantly women.
>
> So I think as a natural course of events, there is going to be more women excused than men, and that is exactly what happened.
>
> The People accepted two people of African American descent, no person of Hispanic descent.
>
> I don't think there is a prima facie case.

> THE COURT: Show the court finds that there has not been a prima facie case shown as to either gender or race bias.
>
> We will stand in recess until tomorrow at 10:30. (April 24, 1995 Orig. Rec. at 130-131)

Petitioner is caucasian. His voir dire plaints asserted that the State used five of their six challenges to remove women, including two African-American women from the jury pool (Orig. Rec. at 130-31). The Court's controlling precedent holds that a criminal defendant may object to race-based exclusion of jurors whether or not the defendant and the excluded jurors share the same races, *Powers v. Ohio*, 499 U.S. 400, 402, 111 S.Ct. 1364, 1365 (1991). In *J.E.B. Alabama ex rel. T.B.* 511 U.S. 127, 114 S.Ct. 1419 (1994), the Court extended *Batson* and its progeny to prohibit the exercise of peremptory challenges based on gender. The courts of appeals reviewing *Batson/Powers/J.E.B.* claims hold the errors to be "structural"—not amenable to harmless error analysis. See *Ford v. Norris*, 67 F.3d 162, 171 (8th Cir. 1995) (holding that a "constitutional violation involving the selection of jurors in a racially discriminatory manner is a 'structural defect' . . . which cannot be subjected to a harmless error analysis."); *Rosa v. Peters*, 36 F.3d 625, 634, n. 17 (7th Cir. 1994) (holding that harmless error analysis is inappropriate in a *Powers* case); *Ramseur v. Beyer*, 983 F.2d 1215, 1225, n. 6 (3rd Cir. 1992) (in banc) ("[H]armless error analysis is inappropriate in cases involving discrimination in the jury selection process."), *cert. denied*, 508 U.S. 947, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993).

In *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836 (1985), the Court affirmed the granting of § 2254

relief holding that Due Process and right to counsel confluences compelled the conclusion that a defendant is entitled to effective assistance of counsel on direct appeal (A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney).[10] See *Goodwin v. Johnson*, 132 F.3d 162, 174 (5th Cir. 1998) (describing the need for effective assistance of counsel on appeal, explaining: As such, we conclude that the right to effective assistance of counsel, both at the trial and appellate level, is recognized not for its own sake, but because of the effect that it has on the ability of the accused to receive a fair trial) (internal quotation marks and citations omitted).

Petitioner was convicted in May 1995 and his direct appeal was prosecuted during 1995-1996. The *Batson/Powers/J.E.B.* decisions comprised an integral component of federal due process and equal protection constitutional law *prior* to the prosecution of petitioner's

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[10] In *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S.Ct. 585, 591 (1956), the court explored the Illinois appellate system finding that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal adequate and effective. The safeguards included the right to counsel in accordance with *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963).

Effective assistance of counsel, per the Sixth Amendment, has had state application through the Fourteenth Amendment since *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796 (1963); *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14 (1970) (it has long been recognized that the right to counsel is the right to the effective assistance of counsel).

direct appeal as a matter of right under Illinois law. Petitioner's trial counsel clearly advanced *Batson/Powers/J.E.B.* jury taint. Yet appellate counsel never ordered the jury selection transcript, *albeit* the issues "leaped out" from the original record, see *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (the improper comment was obvious on the record, and must have "leaped out" upon even a casual reading of the transcript); *Banks v. Reynolds*, 54 F.3d 1508, 1515-16 (10th Cir. 1995) (appellate counsel may deliver a deficient performance and prejudice a defendant by omitting a dead-bang winner).[11]

Under the circumstances of this case, it was objectively unreasonable for direct appellate counsel to have omitted from the record on direct appeal the jury selection transcript which shaped the federal constitutional issues never presented on direct appeal.

Petitioner was deprived of his valued right to be present during important segments of the jury selection process. His trial counsel could not act as his surrogate absent an on-the-record waiver—which trial counsel failed to initiate or confirm.

Petitioner's appellate counsel failed to secure the jury selection transcript notwithstanding clear questions of petitioner's *unexplained* absence during important voir dire jury selection colloquies. Appellate counsel failed to recognize the impact of the *Batson/Powers/J.E.B.* trial plaints where they "leaped out" from the original rec-

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[11] In *Evitts v. Lucey*, *ante* at 469 U.S. 395-396, 105 S.Ct. at 836, the Court applied the effective assistance of counsel standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

ord. In combination, it is evident that petitioner was deprived of that to which he was constitutionally entitled—effective assistance of trial and appellate counsel.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Third District, Illinois Appellate Court.

Respectfully submitted,

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Attorney for Petitioner
KURT E. JOHNSON

APPENDIX

NOTICE [Filed April 24, 1998]

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

3-97-0609

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court for the 12th Judicial Circuit
Plaintiff-Appellee,	)	Will County, Illinois
v.	)	No. 96-CF-22
KURT E. JOHNSON,	)	Honorable Stephen D. White
Defendant-Appellant.	)	Judge, Presiding

ORDER

"Not To Be Published"

Following his conviction for murder, defendant Kurt E. Johnson was sentenced to 38 years in the Department of Corrections. Defendant then filed a post-conviction petition, which the circuit court dismissed. On appeal, defendant contends that the trial judge erred in dismissing the petition without an evidentiary hearing

and that his trial and appellate counsel provided ineffective assistance. We affirm.

In determining whether to hold an evidentiary hearing on a post-conviction petition, all well-pleaded facts in the petition and accompanying affidavits are taken as true. *People v. Brisbon*, 164 Ill.2d 236, 245, 647 N.E. 2d 935, ___ (1995). To merit an evidentiary hearing, the petition must make a substantial showing of a constitutional violation. *People v. Manikowski*, ___ Ill.App.3d ___, ___, 679 N.E.2d 840, 845 (1997).

Defendant contends that the trial judge should have conducted an evidentiary hearing to determine if his trial was constitutionally flawed. Specifically, defendant asserts that portions of the *voir dire* were conducted outside his presence, including the question of some jurors who were eventually empaneled.

In *People v. Starks*, 287 Ill.App.3d 1035, 1039, 679 N.E.2d 764, ___ (1997), this court held that the issue of a defendant's absence from *voir dire* is waived unless the defendant objects and raises the issue in his post-trial motion. Here, the defendant did neither. Under the plain error doctrine, however, this court may review the record to determine whether the defendant's absence resulted in the denial of a substantial constitutional right that jeopardizes the fairness of the trial. See *People v. Bean*, 137 Ill.2d 65, 80, 560 N.E.2d 258, 265 (1990). After conducting such a review, we conclude no evidentiary hearing was warranted. The record discloses that the defense suggested to the trial judge that the adverse effects of pretrial publicity could be limited by the hallway *voir dire* procedure that was used. This issue does not rise to the level of plain error.

Defendant also contends that his trial and appellate counsel were ineffective. Specifically, defendant claims that counsel failed to protect his right to be present during portions of the *voir dire* and that counsel failed to pursue a potential claim for discriminatory use of prosecutorial peremptory challenges.

In order to establish that a defendant was denied effective assistance of counsel, he must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, "were it not for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Whitehead*, 169 Ill.2d 355, 380, 662 N.E.2d 1304, ___ (1996); *People v. Albanese*, 104 Ill.2d 504, 525, 473 N.E.2d 1246, 1255 (1984). In emphasizing defendant's duty to show prejudice, Illinois courts have noted that the standard for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the operation of the adversarial process that the trial cannot be relied upon as having achieved justice. *Albanese*, 104 Ill.2d at 525, 473 N.E.2d at 1255. A defendant claiming ineffective assistance must also overcome a "strong presumption that counsel's complained of action or inaction was merely trial strategy." *People v. Medrano*, 271 Ill.App.3d 97, 100, 648 N.E.2d 218, ___ (1995). As discussed above, the record shows that defendant's trial counsel had a strategic reason for suggesting the procedure: ferreting out prejudicial pre-trial publicity without contaminating the entire venire. Defendant has failed to show that his counsel's conduct was unreasonable in light of this strategic decision.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court

outlined the procedure for determining whether the State used its peremptory challenges in a racially discriminatory manner. First, the trial court is to determine whether the defendant has made out a *prima facie* case of discrimination. If the trial court determines that the defendant has made the necessary showing, the burden shifts to the State to provide legitimate race-neutral reasons for its use of peremptory challenges. Last, the trial court must determine, in view of all of the relevant circumstances, whether the defendant has demonstrated the existence of intentional racial discrimination. *People v. Davis*, 287 Ill.App.3d 46, 51, 677 N.E.2d 1340, 1344 (1997).

In order to make a *prima facie* showing of discrimination, the defendant is required to raise an inference that the prosecutor exercised peremptory challenges to remove venire members based upon race. *People v. Andrews*, 146 Ill.2d 413, 424, 588 N.E.2d 1126, 1133 (1992). Defendant argues that,

> "the prosecution dismissed a Hispanic single woman juror with *exactly* the same background as the Hispanic single woman juror not peremptorily challenged." (Emphasis in original.)

While the two potential jurors had similar backgrounds, their personal histories and experiences with the criminal justice system were not identical. The decision to accept one member of venire, while rejecting a person of the same ethnicity and gender, merely raises the inference that the prosecution differentiated between the two potential jurors on the basis of some aspect of their employment, education or personal background. Since defendant's post-conviction petition failed to al-

lege a *prima facie* case of discrimination, the trial judge properly dismissed the petition without an evidentiary hearing.

The judgment of the circuit court of Will County is affirmed.

Affirmed.

LYTTON, J., with HOLDRIDGE and SLATER, JJ., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 24th day of April in the year of our Lord one thousand nine hundred and ninety-eight.

/s/ Gist Fleshman

Clerk of the Appellate Court

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 6, 1998

Mr. Allan A. Ackerman
Law Offices of Allan A. Ackerman
2000 N. Clifton
Chicago, IL 60614

No. 85505 – People State of Illinois, respondent, v. Kurt Johnson, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1998.

REPORT OF PROCEEDINGS – JURY SELECTION PROCEEDINGS, APRIL 24, 1995 (Transcribed by the Official Court Reporter for the first time in January 1997 in connection with petitioner's Illinois post-conviction petition).

(Whereupon, Ms. Norberg entered.)

THE COURT: Usually, they find their way here.

E-20, Ms. Norberg?

MS. NORBERG: I wasn't sure.

THE COURT: That is okay.

MS. NORBERG: Howard was brought in the federal court. This was twenty years ago and it was with—just guilt by association with a construction company.

And he was innocent. So I mean I don't know if it had anything—

THE COURT: Nothing came of it?

MS. NORDBERG: No. I mean a few of the people were sent away, you know. They were—they went to prison, but it was guilt by association more or less.

THE COURT: Now, was he actually charged though in court?

MS. NORBERG: He had to go to trial.

THE COURT: He was found not guilty?

MS. NORDBERG: Right, right.

THE COURT: Do you think he was treated fairly?

MS. NORDBERG: Oh, yes.

THE COURT: Do you hold it against the police or prosecution because of that?

MS. NORDBERG: No.

THE COURT: Is there anything about that that you think might effect you here?

MS. NORDBERG: I don't think.

THE COURT: Anything else?

MS. NORDBERG: No.

THE COURT: How about victim of a crime?

MS. NORDBERG: Pardon?

THE COURT: Victim of a crime?

MS. NORDBERG: It was a crime.

It was just a construction company thing.

THE COURT: So you have answered both questions when I get to you.

(Whereupon, Ms. Nordberg exited.)

* * * * * *

THE COURT: You are number?

MS. HENEGAR: D-12.

THE COURT: Which one of these—

MS. HENEGAR: Well, that is that—I was going to ask to make sure.

I have a second cousin that was a convict and jailed quite a few years back.

THE COURT: Here?

MS. HENEGAR: No. Cook County.

THE COURT: For?

MS. HENEGAR: He was in with—what do you want to say, Mafia?

THE COURT: Do you think he was treated fairly?

MS. HENEGAR: Oh, yeah.

THE COURT: Do you hold it against the police or prosecution because of that?

MS. HENEGAR: No.

THE COURT: Is there anything about that that you think might effect you here?

MS. HENEGAR: Not really, but I wanted to make sure I told you.

THE COURT: Okay. Anything else about about being the victim—

MS. HENEGAR: No.

TR. 42 - L 13 to TR. 43 - L 12

* * * * * *

THE COURT: Hi, Mrs. Metoyer?

MS. METOYER: When you asked the question before if you have ever been convicted, it didn't dawn on me, but my husband was charged 15 years ago for being at a party with minors with alcohol.

I honestly can't remember all the details.

THE COURT: Was he a minor?

MS. METOYER: No. He was 21. I was a minor.

THE COURT: So he is the preverbial one where he—

MS. METOYER: He didn't purchase it. We just happened to go to the party.

THE COURT: Was he treated fairly?

MS. METOYER: The answer is no; but does that alter my judgement? As I said, I didn't even think about it.

THE COURT: Do you hold it again the police or prosecution because of it?

MS. METOYER: (No audible response)

THE COURT: How—the group that was there. Did they just like pick him?

MS. METOYER: Well, he was the oldest and, when the police came, it was the prosecuting attorney—it was his daughter's house.

So when you say—it was kind of a no-win situation.

We were young and stupid, but I didn't feel like I could go any further without admitting that.

I feel better.

(Whereupon, Ms. Metoyer exited.)

* * * * * *

THE COURT: Bring in Ms. Henegar—

(Whereupon, Ms. Henegar entered.)

THE COURT: You said you had heard something about the case.

What do you recall?

MS. HENEGAR: I am not even sure if it's the same case. That is why I keep saying I am not sure.

THE COURT: Which case do you think it is?

MS. HENEGAR: I happened in Crete.

THE COURT: No.

MS. HENEGAR: Wrong case.

THE COURT: All right.

MS. HENEGAR: That was the one I was reading about was—happened in Crete.

(Whereupon, Ms. Henegar exited.)

TR. 86 - L 12 to TR. 87 L - 7

IN THE CIRCUIT COURT OF
THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Post Conviction No. _____
Plaintiff,	)	
vs.	)	No. 93 CF 4650
	)	
	)	Honorable Stephen D. White
KURT E. JOHNSON,	)	Judge Presiding
	)	
Defendant.	)	

AFFIDAVIT

Kurt E. Johnson, first being duly sworn on oath deposes and states:

1. That I am the defendant in 93 CF 4650. This affidavit is tendered in support of my first Post-Conviction Petition.

2. That on April 24, 1995, after I was arraigned on the superseding indictment, I never gave up my constitutionally protected right to be present during all stages of jury selection. Had Judge White explained, in open court, that I had the right to be present while jurors were removed from the courtroom to be questioned individually, I would have insisted on exercising my right to be present.

3. My appellate lawyer, Lawrence J. Czepiel, Esq., never advised me that my inability to be present during all stages of jury selection meant that I was constitutionally deprived of my right to be present at all critical stages of my trial; further that jury selection was a

critical stage of my trial. Had attorney Czepiel so advised me, I would have insisted that the issue be presented for appellate consideration.

4. I do recall that on either April 24 or April 25, the lawyers representing me during trial raised questions regarding the exclusion or the striking of certain jurors. I did not understand, at that time, that the prosecution can be held accountable for striking or dismissing jurors based upon their gender, race or ethnic background.

Respectfully submitted,

_____
Kurt E. Johnson

SUBSCRIBED and **SWORN**
to before me this ____ day
of February, 1997.

_____
Notary Public

Witness:

_____